

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

8 p/s
ORIGINAL

74-1793

To be argued by
ARTHUR M. HANDLER

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

RACHEL EVANS, STEVEN R. KIDD, FERNELL
PATTERSON and WALTER B. BROOKS, JR., on be-
half of themselves and all others similarly situated,

Plaintiffs-Appellants,

against

JAMES T. LYNN, Secretary, Department of Housing and
Urban Development, et al.,

Defendants-Appellees,

and

TOWN OF NEW CASTLE,

Defendant-Intervenor-Appellee.

BRIEF FOR APPELLEE TOWN OF NEW CASTLE

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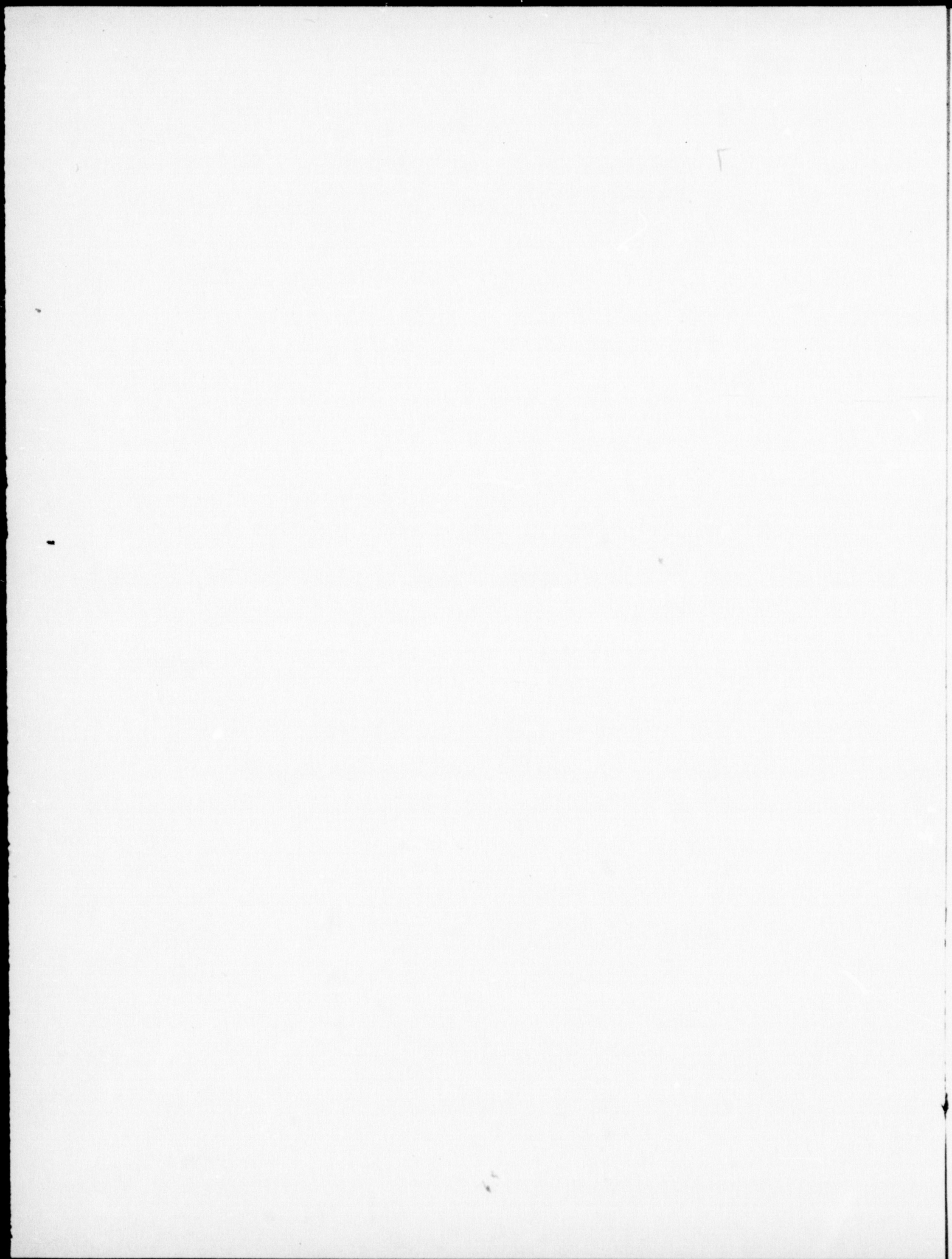
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COUNTER-STATEMENT OF ISSUES

1. Did the District Court correctly dismiss appellants' complaint for lack of standing where the complaint failed to allege that the challenged actions of the governmental defendants in approving the sewer and park grants caused appellants actual or threatened injury and the stipulated record facts establish the lack of any injury to appellants?

2. Does the complaint state a claim upon which relief may be granted where (a) appellants seek to challenge the legality of Town's zoning ordinance notwithstanding their admitted lack of interest in any land, property or any proposed construction of housing in Town; (b) the governmental defendants are under no affirmative duty to construct, plan or promote low income multi-family housing in Town; and (c) the sewer and park projects are not alleged to be tainted by unlawful discrimination and appellants have so stipulated?



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RACHEL EVANS, STEVEN R. KIDD, FERNELL :
PATTERSON and WALTER B. BROOKS, JR., :
on behalf of themselves and all others :
similarly situated, :

Plaintiffs-Appellants, :

-against- :

: Docket No. 74-1793

JAMES T. LYNN, Secretary, Department :
of Housing and Urban Development, :
et al., :

Defendants-Appellees, :

-and- :

TOWN OF NEW CASTLE :

Defendant-Intervenor-Appellee :

-----x
BRIEF FOR APPELLEE
TOWN OF NEW CASTLE

Statement of the Case

The instant lawsuit represents a bold coercive effort to restrain the funding of two federal grants to admittedly non-discriminatory projects having nothing to do with housing in order to induce a change in the existing zoning ordinance of appellee Town of New Castle ("Town"). The grant of the Department of Housing and Urban Development ("HUD") to the King-Greeley Sewer District ("King-Greeley") is for the construction of a

new sewer system. The grant of the Bureau of Outdoor Recreation, Department of Interior ("BOR") to Town is for development and use of Turner Swamp as a recreation area. No claim is made by appellants that Town or King-Greeley have in the past or intend in the future to bar persons from the use of the sewer and admission to the park facilities on the basis of race, creed, religion, national origin or other unlawful basis.

Appellants' complaint was dismissed by the Hon. Milton Pollack, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of standing. Judge Pollack's opinion and order is reproduced in full in the Joint Appendix at 90a.*

The complaint (1a-16a) does not name Town or King-Greeley as parties defendant. Nonetheless, it is alleged that Town engaged in "discriminatory land use practices" (3a, 4a, 6a, 9a) by reason of its existing zoning ordinance which provides for single-family residential development and prohibits multi-family housing thereby in effect mandating "only the most expensive form of housing in New Castle" (11a).

This condition, according to the complaint, means that "only the most wealthy can afford to live in New Castle" (11a), and

*References throughout except as otherwise noted are to the Joint Appendix filed with the Court.

has resulted in "a disproportionately white, disproportionately wealthy population" and exclusion of low income black and Spanish-speaking people (10a-11a).

The complaint alleges that the governmental defendants in approving the sewer and park grants to Town failed in their duty to affirmatively promote fair housing and violated the Fifth Amendment and various federal statutes (12a, 13a). An injunction is demanded restraining disbursement of the federal funds "until New Castle ceases from engaging in land use practices which exclude minority and low-income people from its boundaries" as well as a declaratory judgment and other relief. (14a-16a).

Proceedings Below

By notice of motion dated September 13, 1973 the federal defendants moved to dismiss the complaint pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure (17a-18ea). Defendants Carroll and Tri-State similarly moved by notice of motion dated September 24, 1973 (39a-42a). Plaintiffs moved for class action determination and for preliminary injunction restraining disbursement of the funds under grants approved to the Town (19a-42a; 92a).

On October 19, 1973, the return date of these motions, the Court in a preliminary discussion with counsel (other than counsel for Town which was not then a party) indicated that it would aid any evidentiary hearing that might be required if the government were to file and serve the administrative records of these grants (94a-95a), which was done. Plaintiffs were permitted to take depositions of certain government officials, extracts of which are reproduced in the Joint Appendix.*

On March 9, 1974, Town and King-Greeley applied for leave to intervene as parties defendant in this action (64a, 82a-83a). Thereafter with leave of the Court the intervenors, pursuant to notice dated and served March 13, 1974, conducted the oral depositions of appellant Rachel Evans to ascertain facts relative to her legal standing to sue (64a).

Following the Evans' deposition, at the suggestion of the Court and to expedite the proceedings, counsel for

*Since the District Court dismissed the complaint on jurisdictional grounds, to wit, lack of standing and did not reach the merits of plaintiffs' claim (102a), no evidentiary hearing was held. Accordingly, the witnesses deposed by plaintiff never testified in open court and were never subject to cross examination. Objections to this deposition testimony on grounds of admissability, relevancy, etc. were not ruled upon. Indeed, Town was not even present at the depositions. Since these depositions were not admitted in evidence below, they are not binding upon Town, and should not be considered by this Court on this appeal.

plaintiff and intervenors executed a Stipulation of Facts dated April 5, 1974 (64a; 84a-86a), thus obviating the need to depose the remaining plaintiffs relative to the issue of standing.

By notice of motion dated April 15, 1974, supported by affidavits of Richard E. Burns, Supervisor of Town and Arthur M. Handler, attorney for intervenors, and exhibits, including the aforesaid Stipulation and Evans' deposition, the intervenors moved for dismissal of the complaint pursuant to Rules 12(b)(1) and (6), Fed. R. Civ. P.

The District Court's Opinion and Order

Judge Pollack carefully reviewed the pertinent facts regarding the background of the grants and the plaintiffs' utter lack of interest and connection therewith and correctly concluded that plaintiffs failed to meet the standing test articulated in such cases as Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Warth v. Seldin, 495 F.2d 1187 (2d Cir. 1974) (98a, 100a).

In reaching this conclusion, Judge Pollack assumed arguendo that plaintiffs were correct in arguing they were within the ambit of the Civil Rights Acts, alleged in their complaint. He wrote:

"However, even if plaintiffs are deemed to be within the ambit of the Civil Rights Acts, that by itself does not satisfy the "two-pronged" standing requirement noted above. For it is the existence of an injury in fact which is the sine qua non of standing; there must be, at base, some threatened or actual injury to the plaintiffs resulting from the putatively illegal action before a federal court may assume jurisdiction. Litigants who seek to vindicate their own value preferences through the judicial process where there is neither injury in fact to plaintiffs nor a personal stake in the outcome of the controversy, viz., an actual and immediate interest, lack standing to sue." (100a-101a)

The District Court correctly held that the plaintiffs did not and could not allege that any injury had been sustained by reason of the sewer and park grants herein (102a). It recognized that although the complaint was not aimed directly at overturning the Town's zoning ordinance as in Warth v. Seldin, 495 F.2d 1187 (2d Cir. 1974), the legality of such ordinance was the core of the dispute, since the actions of the governmental defendants could not be declared unlawful absent a determination that the zoning ordinance results in unconstitutional racial and economic segregation of appellants. Such determination could not be made under Warth, supra. "Potential residents, as such, can claim at best only a remote, speculative injury, and a speculative injury cannot be made the cornerstone of standing." (104a)

The District Court also considered and correctly rejected the argument advanced by appellants on this appeal that they must be found to have standing because no one else does. Judge Pollack noted that this argument was "wide of the mark, both as a matter of law and fact." The Court observed:

"...[T]he mere fact that a qualified plaintiff is not presently in Court in no way qualifies these, or any other, uninjured plaintiffs to litigate the issue posed here. To argue that everyone has standing simply because no one can now be found is a reductio ad absurdum that this Court cannot accept."
(105a)

Factually this argument was also unpersuasive since, as pointed out by the District Court, there could well be various classes of plaintiffs who might be able to challenge the actions of the governmental defendants (105a). The essential point, of course, is that appellants "can point to no injury they personally have suffered because of the agencies' actions" (105a-106a).

Since the standing requirement is jurisdictional, the District Court, following the clear mandate of the United States Supreme Court, did not consider the merits of the case, and dismissed the complaint.

The opinion and order of the District Court is supported by binding case law precedent. Consideration of the relevant facts, most of them stipulated, demonstrates that appellants have sustained no actual or threatened injury as a result of the challenged federal grants and lack the requisite stake in the outcome of this controversy required for standing.

Statement of Facts

A. Description of Town and King-Greeley

Town is located in northern Westchester County and consists of part of the Village of Mt. Kisco, the hamlets of Chappaqua and Millwood, and parts of Ossining and Briarcliff Manor. It has a land area of approximately 25 miles, and its present population is approximately 20,000. (45a)

King-Greeley and Town are not one and the same. King-Greeley is an Improvement District duly organized and existing pursuant to Article 12-A of the N.Y. Town Law (McKinney 1965). It has no legal power or authority to enact or modify the Town's zoning ordinance (45a).

King-Greeley is the oldest and most settled portion of the hamlet of Chappaqua. It is approximately one mile square

and is zoned for 1/4 acre and 1/2 acre housing as well as business uses. Much of the housing is on less than 1/4 acre having been built prior to the enactment of the Town's Zoning Ordinance in 1930. Such pre-1930 construction also includes some multi-family housing (46a).

There are more than 330 structures within King-Greeley, most of which are residences. In addition, there are four religious facilities, numerous businesses, the local public library, and two schools. King-Greeley can be characterized as "densely populated". (46a; see Item 6 of Draft Environmental Clearance Worksheet, Plf. Ex. 1, Doc. 6*).

Contrary to plaintiffs' contention, the residents of King-Greeley are not the typical wealthy suburbanites. The greater majority of the residences in King-Greeley are more than 30 years old, and are occupied by persons of the lower and lower middle income ranges, although the district also contains some expensive residences. Many of the Town's municipal employees and senior citizens live in King-Greeley (46a).

Depriving King-Greeley of federal funds to construct its sewer system cannot coerce King-Greeley into modifying its zoning. First, King-Greeley has no authority with respect to

*"Plf. Ex. 1" is the government's administrative file filed with the Court below.

zoning. Second, the area is already "saturated" with residential housing much of which was constructed prior to the enactment of the present zoning ordinance on lots smaller than presently required (47a).

B. Plaintiffs-Appellants

The sworn deposition testimony of appellant Rachel Evans* sharply contradicts the allegations of the complaint and together with the Stipulation of Facts dated April 5, 1974 (84a-86a), establishes appellants' lack of standing and the absence of a justiciable controversy.

Although the complaint verified by Mrs. Evans alleges she resides in "a deteriorated building stated for demolition in the near future" and is "not able to find decent housing" (Compl., par. 3) and alleges that plaintiffs and others (i.e., "black and Spanish-speaking persons and all other persons of low income") would be deprived of the benefits of the federally funded sewer and park project (Compl., pars. 21, 23), the admitted facts are quite different (65a-67a):

*The transcript was filed with the Court along with Town's and King-Greeley's motion to dismiss the complaint (64a).

(a) Mrs. Evans swears that since September 1973, she resides in "decent housing" (Tr. 43*), a six-room apartment with 1-1/2 baths in a public housing development (Tr. 3, 9, 12-13). Her neighbors are people of of all races (Tr. 44). Her residence is not scheduled for demolition and she intends to continue residing there -- "the space is fine." (Tr. 18, 21, 27, 43).

(b) Her home is within walking distance of a park, accessible to her children (Tr. 21, 27). Mrs. Evans has no problem with her sewer system (Tr. 30-31).

(c) She at no time has sought to secure housing anywhere in Town, and does not know the area known as King-Greeley (Tr. 31-32). Although she has heard of Turner Swamp, she does not know where it is or whether she has even been to it (Tr. 32).

(d) In explaining the allegations of her verified complaint that she is denied an opportunity to share in the benefits extended to Town, Mrs. Evans conceded that she could not participate in the benefit of any sewer system other than the one which served her residence (Tr. 34-35), and that even

*"Tr." refers to pages of the Evans' deposition transcript filed with the District Court.

residence in Town would not assure her of use and benefit of the sewer system at bar, if she did not actually reside in King-Greeley (Tr. 36). Accordingly, she could point to no benefit she would gain or injury she would suffer as a result of the sewer grant to King-Greeley.

(e) With respect to her allegations of injury flowing from the preservation of the wetlands of Turner Swamp, Mrs. Evans acknowledged that she did not claim that members of the public, who were not residents of Town would be denied admittance. Nor did she have reason to believe that she would be denied admittance (Tr. 37). Her claim of lack of opportunity to enjoy the proposed park of Turner Swamp (Compl., par. 23) is based on the fact that she does not have a car (Tr. 37), and even with transportation, such facilities are inaccessible "because from where I live it's completely out of my way" (Tr. 40). Significantly, Mrs. Evans conceded that she would regard the park as inaccessible even if she lived in Town if it was not within walking distance (Tr. 40).

Mrs. Evans, in short does not claim that she desires, has sought or has been denied the use and benefit of the funds for or the proposed sewer and park project challenged in this suit. The basis of her complaint is best explained by her own testimony:

"I have the understanding that these grants are issued to benefit the poor communities, the communities that really need these facilities. *** From what I have seen of New Castle, it is not a poor community at all. That's my objection, not New Castle, just because of the name New Castle, but I would object just as strongly if it was any other rich area in any other town."
(Tr. 52-53).

The Stipulation of Facts (84a-86a) confirms that the other named appellants are in substantially the same deficient legal position as Mrs. Evans. The Stipulation establishes that none of the other appellants have any interest in the federal grants at bar or have sustained any actual or threatened injury by reason of the challenged governmental conduct. Thus, it is stipulated that:

(a) None of the named plaintiffs has sought housing in the Town (par. 1).

(b) None of the named plaintiffs or any political sub-division in which they reside applied for or was deprived of the federal funds granted to Town and King-Greeley (par. 2); and

(c) Plaintiffs do not claim that the sewer and park projects will be operated on a discriminatory basis,

and that the benefits of the projects will be denied to persons on the basis of race, creed, color or income (pars. 3, 4, 5).

C. The King-Greeley Sewer Project

The terrain of King-Greeley is largely hilly and rocky, making for an expensive sewer project. The total cost was originally estimated at \$1,747,500, and the HUD grant amounts to \$358,300 (see Plf. Ex.1, Docs. 13, 31). Present estimated cost is \$2,100,000. The federal contribution will reduce substantially the burden on the individual King-Greeley property owners. By calculating principal and interest costs, absent the federal grant, each property owner will be compelled to pay approximately 25% more per annum for this sewer facility (47a).

There is an acute need for the sewer project which has been under consideration for approximately 10 years. King-Greeley, being the older more settled portion of the hamlet of Chappaqua has largely inadequate septic fields and septic tank disposal systems (47a). Because of the rocky terrain, the soils are unable to absorb additional wastes. Numerous residences have suffered extensive septic failures over the years (47a-48a). As stated in King-Greeley's application for federal funding: "The faulty systems are causing spillage of raw sewage

over land and creating a public nuisance and serious potential health problem for the area and entire Town." (48a; Plf. Ex. 1, Doc. 13).

The sewer project was endorsed by the Westchester County Department of Health, Westchester County Department of Planning and New York State Department of Environmental Conservation (48a; Plf. Ex. 1, Doc. 31, p.2; 71a-72a; 73a-74a).

The sewer project will service all properties within King-Greeley including those currently used as multi-family residences (48a), and is sufficient in size to handle existing buildings as well as any new construction which might subsequently be built in King-Greeley, including multi-family residential units and business development. Its design is adequate to service future growth (49a; 50a; see Plf. Ex. 1, Doc. 22).

There is no policy or plan to exclude any resident or property from use and benefit of the sewer on the basis of race, creed, religion, income or other discriminatory basis (49a). In connection with the Sewer grant, the Town Board of New Castle authorized then Supervisor George F. Oettinger to execute and file "an assurance of compliance with the Department regulations under Title VI of the Civil Rights Act of 1964". (50a; Plf. Ex. 1, Doc. 15). This Assurance of Compliance was executed on April 26, 1972 (Plf. Ex. 1, Doc. 13; 76a-77a). Under its terms, King-Greeley, among other things, agreed:

"[I]t will comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352 and all requirements imposed by or pursuant to the Regulations of the Department of Housing and Urban Development (24 CFR, Subtitle A, Part I) issued pursuant to that Title, to the end that, in accordance with Title VI of the Act and the Regulations, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant receives Federal financial assistance from the Department of Housing and Urban Development, and HEREBY GIVES ASSURANCE that it will immediately take any measure necessary to effectuate this agreement." (Emphasis added).

King-Greeley has fully complied with its agreement, and plaintiffs make no claim that use and benefit of the proposed sewer system will be withheld from King-Greeley residents on some discriminatory basis.

Plaintiffs on this appeal improperly seek to reach the merits of their claims, and argue, among other things, that the "financial need" sections of the HUD rating sheet for this project are erroneous. (App. Br. pp. 11-15) This argument is based on assumptions and irrelevant underlying data such as census figures referring to the median income for Town. Such figures have no relevancy to King-Greeley, since it is clear that despite the absence of exact income figures for King-Greeley, the median income is considerably lower than that of the entire Town (51a).

D. Preservation Of Turner Swamp

Turner Swamp (and the adjacent Kipp Street School property), consisting of approximately 38 acres, lies approximately one mile from the hamlet of Chappaqua and is surrounded by residential development. It is largely a bog or marsh area which drains approximately 250 surrounding acres. In addition to its drainage function, it also serves as a natural wildlife preserve. The purposes to be served by the proposed project are public health and safety as well as environmental, recreational and educational (52a).

Plaintiffs do not claim that the Town is developing the Turner Swamp as a recreational and park facility in order to prevent the construction of multi-family housing on the site. Indeed, it is clear that the proposed park project has nothing whatever to do with housing (52a-53a). Turner Swamp property is basically unsuitable for development because of its boggy, marshy characteristics and because development would seriously increase drainage problems in the hamlet of Chappaqua creating possible dangers of flooding (53a).

Environmental and educational considerations sharply favor preservation of Turner Swamp. Prior to its acquisition by the Town, it was one of the last remaining wetlands under

private ownership and its acquisition by the Town was vital to the Town's future development insofar as wildlife and recreation purposes are concerned. The area is highly suitable for use as a managed wildlife area where a varied wildlife population already exists and needs only be encouraged. It is also contemplated that the area be used by school children for nature studies (53a).

In connection with its application for a federal grant, the Town executed an Assurance of Compliance on June 22, 1972 (77a). Under its terms, the Town obligated itself as follows:

"Town of New Castle (hereinafter called 'Applicant-Recipient') HEREBY AGREES THAT IT will comply with Title VI of the Civil Rights Act of 1964 and all requirements imposed by or pursuant to the Department of Interior Regulation pursuant to that Title, to the end that, in accordance with Title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color or national origin be excluded from participation in, be denied the benefits of, or be otherwise subject to discrimination under any program or activity for which the Applicant-Recipient receives financial assistance from the Bureau of Outdoor Recreation and Hereby Gives Assurance That It will immediately take any measures to effectuate this agreement."

E. Background of Appellants' Complaint

Various persons associated with Suburban Action, the real plaintiff in this action, have from time to time expressed opposition to the existing zoning ordinance in the Town and indicated that a court action challenging the zoning was being considered. No such action was commenced by Suburban Action (56a). Instead, upon learning of the approval of the two federal grants, Suburban Action sought to pressure the governmental agencies into changing their decision (56a).

By letter dated January 19, 1973, Suburban Action wrote a seven-page letter of complaint to HUD and to Tri-State Regional Planning Commission outlining their legal theories and objections to the federal grants. Both HUD and BOR reviewed Suburban Action's objections and concluded again that the grants were legally proper and desirable. These conclusions were communicated to Suburban Action by letters from HUD and BOR. (Plf. Ex. 1, Docs. 12 and 39). S. William Green, Regional Administrator of HUD by letter dated May 9, 1973, stated:

"[T]here is no legal basis for cancellation of the contract with the Sewer District."
(Doc. 39, supra.)

James G. Watt, Director of BOR likewise concluded that the

grants were proper and in compliance with applicable statutes and regulations. In addition, he observed:

"...we feel that the project contributes to balanced patterns of settlement by providing open space, and its 'services', i.e. outdoor recreation, are of benefit not only to all persons who wish to take advantage of them, but, more importantly, to the human environment generally."
(Doc. 12, supra)

Suburban Action did not send its letter to the Town, although a copy subsequently came into possession of then Supervisor George F. Oettinger. Supervisor Oettinger responded point by point to Suburban Action's letter in his own letter dated January 22, 1973 (78a-81a; 57a). Supervisor Oettinger's letter concludes:

"If Mr. Gold and Mr. Davidoff [of Suburban Action] are sincere, they should mount a legal attack against our Zoning Ordinance."
(81a).

This invitation to challenge Town's zoning ordinance was not accepted. Instead, Suburban Action commenced the instant action without even joining Town and King-Greeley as parties defendant with the apparent hope that unsupported cries of discriminatory zoning practices rather than hard facts and legal analysis would cause the governmental defendants to reconsider and cut off federal funds to two projects which have little if anything to do with housing and concededly do not embody discriminatory or exclusionary practices (58a).

F. The Town's Zoning

The complaint before this Court does not challenge the legal validity of the Town's zoning ordinance and there is absolutely nothing in the record to establish that the zoning ordinance is arbitrary, unreasonable and beyond the police power of the Town.

The zoning map of the Town (70a) shows the permitted uses of various areas of the Town. Contrary to plaintiffs, this includes areas zoned for residential use on lots ranging in size from 1/4 acre to 2 acres, various business uses, and planned and general industrial uses. In addition, particularly with respect to King-Greeley, construction prior to the enactment of the zoning ordinance in 1930 has resulted in the existence of homes on smaller size lots and also some multi-family housing (59a).

The current 1971 zoning ordinance as reflected in the zoning map before this Court (70a) was enacted after careful consideration, including preparation of a Town Plan by independent planning consultants. The Town Plan was adopted by both the Planning Board and the Town Board, after numerous public meetings. (59a).

The need and desirability of additional units of

multi-family residential housing has been given careful study by the Town's Planning Board and independent planning consultants (59a-61a). A multi-family housing study has been prepared for the Town, and is presently being continued.*

In short, the current zoning ordinance was duly adopted by the locality only after study and analysis and with knowledge and familiarity of the needs and desires of the community. The need and suitability of adding units of multi-family housing is being given active consideration by the residents of the Town and its elected officials (61a). This, however, is not a proper subject for federal jurisdiction. As Town Supervisor Burns stated:

"I respectfully submit, however, that the zoning of property in the Town and the land uses to be permitted on such property are a matter for the elected legislative body, i.e., the Town Board of the Town of New Castle, to determine. This federal court should not inject itself into a local

*The facts concerning plans of the Urban Development Corporation to construct multi-family housing in Town are set forth in detail in Mr. Burns affidavit (54a-56a). While these facts are in no way relevant to the case at bar or to appellants' lack of standing, they were submitted to rebut the baseless arguments and insinuations advanced by appellants below and repeated on this appeal (App. Br. 39-40). For present purposes it is sufficient to note that U.D.C.'s controversial authority to override local zoning and building codes was removed by the State Legislature, and that following its initial proposal U.D.C. took no steps to implement its proposal for Town, including the holding of the required statutory hearings and other proceedings (56a).

zoning dispute particularly in the instant case where the complaint does not seek a judicial determination of the invalidity of the zoning ordinance or even name the Town as a party defendant, and, concededly plaintiffs are neither property owners in the Town who have been injured by the zoning ordinance or individuals who have in some direct and immediate manner sustained specific injury." (61a-62a)

POINT I

APPELLANTS LACK STANDING TO CHALLENGE THE GRANTS AT BAR AND THE DISTRICT COURT CORRECTLY DISMISSED THEIR COMPLAINT FOR LACK OF JURISDICTION

The growing number of so-called "public interest" lawsuits challenging the legality of governmental conduct has recently caused the United States Supreme Court and this Court as well to inquire closely into the standing of particular plaintiffs to litigate their claims, and to re-view again the requirements of standing and the broader concept of case or controversy.

The District Court was mindful of the constitutional dimensions of the jurisdictional requirement of standing and in dismissing the complaint scrupulously followed binding precedents. E.g., O'Shea v. Littleton, 414 U.S. 488, 38 L. Ed 2d 674 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968); Warth v. Seldin, 495 F.2d 1187 (2d Cir. 1974).

Standing to sue is jurisdictional and appellants' failure to satisfy this crucial threshold requirement requires dismissal of the complaint and forecloses consideration of the merits of their claim. E.g., California Bankers Ass'n

v. Schultz, ___ U.S. ___, 39 L. Ed. 2d 812 (1974); O'Shea v. Littleton, supra. In other words, the inquiry focuses not on the nature of the claim, but on the status of the party. As the Supreme Court stated in Flast v. Cohen, supra:

"The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." 392 U.S. at 99.

It must be the plaintiff himself who has sustained the actual or threatened injury not countless others whom plaintiff believes may be injured by the challenged governmental conduct. Laird v. Tatum, 408 U.S. 1, 13 n.7 (1972); see California Bankers Ass'n v. Schultz, supra; O'Shea v. Littleton, supra.

As Mr. Justice White stated in directing dismissal of the O'Shea complaint:

"The complaint failed to satisfy the threshold requirement imposed by Art III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy. Flast v. Cohen, 392 U.S. 83, 94-101, (1968); Jenkins v. McKeithen, 395 U.S. 411, 421-425, (1969). Plaintiffs in the federal court 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.' Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). There must be a 'personal

stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204 (1962). Nor is the principle different where statutory issues are raised. Cf., United States v. SCRAP, 412 U.S. 669, 687 (1973). Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged statute or official conduct. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). The injury or threat of injury must be both 'real and immediate', not 'conjectural' or 'hypothetical.' Golden v. Zwickler, 394 U.S. 103, 109-110 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947)." 38 L.Ed. 2d at 682.

The law is clear, and the District Court at bar so recognized (98a), that standing to challenge the conduct of government agencies embodies a two-pronged test: (1) actual or threatened injury in fact and (2) arguably within the zone of interests protected by the relevant statute. Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970); Warth v. Seldin, supra.

Appellants' failure to demonstrate threatened or actual injury resulting from the challenged governmental conduct at bar precluded the District Court from assuming jurisdiction in the first instance. E.g., California Bankers Ass'n

v. Schultz, supra; O'Shea v. Littleton, supra; Laird v. Tatum, 408 U.S. 1 (1972); Sierra Club v. Morton, supra; Flast v. Cohen, supra; Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2d Cir. 1973), cert. denied, ___ US. ___ (1974). This failure to satisfy the injury in fact test makes it unnecessary to reach the question of "zone of interests". Sierra Club v. Morton, supra at 733 n.5 (1972).*

*Nonetheless, if this Court deems it appropriate to consider this question it can only conclude that appellants on the facts of this case are not within the zone of interest protected by the Fair Housing Act of 1968, 42 U.S.C. 3601 et seq. First, it is clear that appellants do not fall within the statutory definition of an "aggrieved" person. 42 U.S.C. 3610(a) defines such person as "any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur." The underlying concept here too is injury, a condition which appellants do not fulfill. Moreover, as discussed in Point II, infra, Town is not guilty of any actionable conduct by reason of its limited density zoning ordinance and such zoning ordinance does not constitute a "discriminatory housing practice" as defined in the Fair Housing Act, 42 U.S.C. 3602 (f), 3604, 3605, 3606. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) is inapposite since, unlike the case at bar, it involved a discriminatory housing practice within the meaning of the statute. In addition, unlike Metropolitan Life Ins. Co., the governmental defendants at bar are not charged with administering or operating the subject projects in a discriminatory fashion. It is now clear that, contrary to appellants' arguments, the governmental defendants have no affirmative duty under the Act or the Constitution to construct or promote low income multi-family housing. Acedo v. Nassau County, ___ F.2d ___ (2d Cir., Dkt. No. 74-1235, decided July 2, 1974). See discussion at pp. 41-2, infra.

That a lawsuit is characterized as a "public interest" suit does not relieve the plaintiff from meeting the injury in fact test. Sierra Club v. Morton, supra. While it is recognized that such injury need not be solely of an economic nature, it is imperative that the injury be sustained by the plaintiff himself. As stated in the Sierra Club case:

"The trend of cases ... has been toward recognizing that injuries other than economic harm are sufficient [to confer standing]... But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." Sierra Club v. Morton, supra at 738 (emphasis supplied).

That such claim is alleged to be within the ambit of the Civil Rights Acts, absent actual or threatened injury, does not confer standing. See O'Shea v. Littleton, supra. As noted by Judge Pollack:

"Litigants who seek to vindicate their own value preferences through the judicial process where there is neither injury in fact to plaintiffs nor a personal stake in the outcome of the controversy, viz., an actual and immediate interest, lack standing to sue. (Citations omitted)" (100a-101a)

It is significant that appellants' complaint fails to contain the essential allegation that "the challenged action

has caused him injury in fact, economic or otherwise."

Association of Data Processing Service Organization v. Camp, supra at 152 (1970). That appellants can imagine circumstances in which they could be affected by the governmental agencies' action is insufficient absent allegations of actual harm resulting from such action. United States v. SCRAP, 412 U.S. 669, 688 (1973).

Appellants' lack of actual and immediate interest in the subject matter of this suit is manifest. The record is clear that appellants are not residents of Town or King-Greeley and have never sought housing there. Access to the park facilities will not be denied to appellants or others on the basis of race, creed, religion, or other unlawful basis. The sewer system likewise will serve all residents of King-Greeley on a non-discriminatory basis. Cf., United Farmworkers v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974). In addition, appellants have stipulated that they have not applied for and have not been deprived of the federal funds granted to Town and King-Greeley (84a-86a).

Nonetheless, appellants argue they are injured because they are compelled to live in segregated substandard housing (App. Br., Pp. 22, 24-25).^{*} While such living

^{*}We note in passing that this argument is not supported by the record especially with respect to the one plaintiff who submitted to deposition who testified her living quarters were "fine" and her neighbors were persons of "all races" (65a).

conditions, if proved by appellants, may be considered an "injury", the District Court correctly found "that 'injury' is in no way linked to the particular grants complained of herein. Nor would restraining deliverance of the federal funds in any way alleviate their situation." (102a)

That plaintiffs seek to characterize themselves as "potential residents" of the Town does not create an injury where none exists. Warth v. Seldin, supra. Limited density zoning, as discussed below in Point II, is not unconstitutional or beyond the legitimate exercise of local police power. Had these appellants sought to challenge the legality of the Town's zoning directly rather than in the present indirect manner, their complaint would likewise have been dismissed.

In Warth v. Seldin, supra, this Court recently dismissed for lack of standing a complaint of blacks and Puerto Ricans of low income who alleged that Penfield's zoning laws effectively barred low income housing within the Town and therefore excluded them from living there. As in the instant case, none of the plaintiffs claimed that anyone refused to sell or lease housing or property to him. They conceded that they cannot afford any existing housing within the Town, and did not claim any interest in land within the Town or any connection with any plan to construct

housing for them within the Town. In dismissing the complaint for lack of standing, Judge Hays held:

"Appellants lack such a personal stake. The essence of their complaint is that zoning practices of the appellees are unfair. However true that charge may be, absent a showing that appellants themselves have suffered from these practices they lack standing to challenge them. Their dispute with appellees reflects primarily a political disgruntlement. They indicate no benefit which a judgment favorable to them would produce. They allege neither capability nor intent to construct housing for themselves on any land which the Court might order rezoned as an element of relief." 495 F.2d at 1192

The identical observations are pertinent at bar. This lawsuit represents nothing more than appellants' personal political and sociological viewpoint that federal grants should be withheld from wealthy communities that do not provide multi-family housing. Such a claim does not rise to the level of a case or controversy over which a federal court may assume jurisdiction.

Use of the judicial process to vindicate private value interests or to insure that governmental agencies are properly performing their functions is not only constitutionally impermissible but also inappropriate in the absence of actual injury. It would have the federal courts "as virtually continuing monitors" of the "wisdom and

soundness" of executive and legislative action, a role which is "appropriate for Congress acting through its committees" but not, however, for the judiciary. Laird v. Tatum, supra at 14.

Appellants argue that the District Court reliance on Warth v. Seldin, supra, was misplaced since they predicate their action on the Administrative Procedure Act, 5 U.S.C. §702 and are suing representatively on behalf of others similarly situated. (App. Br., pp. 28, 29). The short answer to this argument is that 5 U.S.C. §702 requires application of the injury in fact test, and appellants so concede.* Indeed, the statutory term "aggrieved" person has been held to mean a person who has sustained an injury in fact. Sierra Club v. Morton, supra; Association of Data Processing Service Organization v. Camp, supra.

Contrary to appellants, United States v. SCRAP, 412 U.S. 669 (1973) confirms this rule. In reviewing the allegations of the complaint in face of a motion to dismiss, the Supreme Court noted the presence of:

*In this connection, appellants state: "Individuals in addition to asserting a generalized 'public interest' in housing or the environment, must also assert injury in fact traceable to them as individuals." (App. Br., pp. 32-33).

"...allegations that their (SCRAP's) members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing and sight-seeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities." 412 U.S. at 685

The Court did not pass on the merits of the claim nor the likelihood that plaintiffs would be able to prove the allegations of the complaint Id. at 689-90. For purposes of sustaining the pleading, the specific allegation of personal injury stemming from the agency action was held sufficient. No such allegations are present in the complaint at bar which, unlike the situation in the SCRAP case, has been supplemented by sworn testimony of one of the appellants and a Stipulation of Facts relevant to standing.*

Use of labels such as "broad" and "liberal" by appellants to avoid application of the well established injury in fact test for standing are neither helpful or persuasive. Indeed, employment of such terms are nothing

*It is arguable that had the Court in SCRAP had the sworn facts before it, dismissal may well have been granted. Id. at 689-90.

more than an incorrect effort to convince this Court to disregard binding holdings of the United States Supreme Court.* E.g., O'Shea v. Littleton, supra; California Bankers Ass'n v. Schultz, supra; Sierra Club v. Morton, supra; Association of Data Processing Service Organization v. Camp, supra; Flast v. Cohen, supra.

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) does not support appellants' position. There, the plaintiffs, tenants who actually resided in an apartment complex, sued their landlord alleging that they were injured by being compelled to live in a "white ghetto." In other words, they claimed an actual injury in fact occasioned by the acts of the defendant landlord in administering the apartment complex in a discriminatory manner. In reiterating the injury in fact test, Mr. Justice Douglas found:

"Individual injury or injury in fact to fact to petitioners, the ingredient found missing in Sierra Club v. Morton, is alleged here. Id. at 209.

*The school desegregation and similar cases cited by appellants at pp. 33-35 do not stand for proposition that the requirement of standing to sue is dispensed with in discrimination cases. Appellants' suggestion, for example, that the District of Columbia Circuit in Adams v. Richardson, 480 F.2d 1159 (D.C.Cir. 1973) (en banc) granted substantive relief to the plaintiffs despite their lack of a personal stake in the litigation is not supported by the Court's decision. Given the fact that cross-motions for summary judgment were made in the District Court and the facts thoroughly explored, it is reasonable to assume that plaintiffs' standing was manifest and therefore not challenged by defendants.

In an attempt to distinguish Warth v. Seldin, supra; O'Shea v. Littleton, supra; and California Banker's Ass'n v. Schultz, supra, appellants posit the same meaningless distinction advanced and rejected below. They assert that, unlike the case at bar, in each of those cases "there was a specific group of identifiable plaintiffs that were directly harmed by the challenged action and who were not before the Court". (App. Br., p.41). Such distinction finds no support either in law or reason. It incorrectly assumes that all disputes present a case or controversy within the meaning of Article III of the Constitution, and that the Court's constitutional concern is only to find the "best" available plaintiff. The conclusion of this dubious argument is that a Court must accept a plaintiff utterly unable to satisfy the requirements of standing where such plaintiff asserts there is no one else available to prosecute the claim. Needless to say this argument is unsupported by any authority. It is directly contradicted by virtually every decision dealing with questions of case or controversy and standing.

Appellants' arguments, in essence, amount to little more than a plea to this Court to ignore binding precedent and permit them to prosecute their claim because no one presently available possesses legal standing. This argument simply buttresses appellees' position that the instant dispute is not an appropriate matter for the federal courts,

restricted as they are by the Constitution to cases or controversies. The political and sociological values appellants seek to enforce are best left to the executive and legislative branches which are qualified by nature and function to address these problems.

POINT II

APPELLANTS' COMPLAINT FAILS TO STATE A CAUSE OF ACTION UPON WHICH RELIEF MAY BE GRANTED

A. The Complaint is Insufficient to Challenge Town's Zoning Ordinance

The motion of Town and King-Greeley also sought dismissal of the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P. for failure to state a claim upon which relief may be granted. In view of the District Court's dismissal for lack of subject matter jurisdiction, it did not reach this branch of the motion to dismiss.

Appellants' complaint is deficient in a number of major respects. It fails to allege that plaintiffs are residents of Town and/or King-Greeley or possess any interest in land or other property or any future construction located in Town. Such an interest or its equivalent is essential even where a plaintiff seeks to challenge the validity of a zoning ordinance on civil rights grounds. Warth v. Seldin, supra and cases therein cited. This has

long been the rule in zoning cases decided in the state courts.*

While the complaint does allege that the Town engages in discriminatory land use practices and policies, this is nothing more than a legal conclusion which is directly contradicted by the record facts and thus does not have to be accepted as true for purposes of Rule 12(b)(6). Pauling v. McElroy, 278 F.2d 252 (D.C. Cir. 1960), cert. denied, 364 U.S. 835 (1960); United Transport Service v. National Mediation Board, 179 F. 2d 446 (D.C. Cir. 1949); United States v. Certain Parcels of Land 141 F.Supp. 300 (D. Wyo. 1956); see generally 2A Moore, Federal Practice §12.08 (1974).

*Under state law, for example, a general interest in enforcing a zoning ordinance does not confer upon a plaintiff a sufficient status to invoke the judicial power, the Courts holding there must be special injury or damage to one's personal or property rights as distinguished from being merely the champion of a cause. Blumberg v. Hill, 119 N.Y.S. 2d 855 (Sup. Ct., Westchester Co. 1953); Hattem v. Silver, 19 Misc. 1091, 190 N.Y.S.2d 752 (Sup. Ct. Nassau Co. 1959); Property Owners Association v. Board of Zoning Appeals of Garden City, 2 Misc.2d 309, 123 N.Y.S.2d 716 (Sup. Ct. Nassau Co. 1953). See also, Brechner v. Incorporated Village of Lake Success, 25 Misc.2d 920, 208 N.Y.S.2d 365 (Sup. Ct., Nassau Co. 1960), aff'd 14 A.D.2d 564, 218 N.Y.S.2d 1017 (2d Dept. 1961), appeal dismissed 11 N.Y.2d 929 (1962); Rice v. Van Vranken, 225 App. Div. 179, 232 N.Y.Supp. 506, (3rd Dept. 1929), aff'd 255 N.Y. 541 (1930).

A reading of the complaint in its entirety, including appellants' prayer for relief, demonstrates that appellants' objection is to the Town's low density zoning. But it is clear that such zoning ordinance is not unconstitutional and is within the reasonable exercise of the community's police power. Village of Belle Terre v. Boraas, ___ U.S. ___, 39 L.Ed.2d 797 (1974). In upholding the validity of a zoning ordinance restricting land use to one-family dwellings, excluding lodging houses, boarding houses, fraternity houses, or multiple dwelling houses, Mr. Justice Douglas observed:

"A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in land use project addressed to family needs. This goal is a permissible one within Berman v. Parker, (348 U.S. 26). The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessing of quite seclusion, and clean air make the area of sanctuary for people." 39 L. Ed.2d at 804

More recently, the New York Court of Appeals upheld a zoning ordinance for single family units stating:

"In short, an ordinance may restrict a residential zone to occupancy by stable families occupying single family homes..." City of White Plains v. Ferraioli, 172 N.Y. L.J., July 10, 1974, p.1, col. 8.

At bar there is no allegation, for example, that Town's zoning ordinance was enacted so as to arbitrarily exclude plaintiffs from purchasing or constructing residential housing in the Town. Cf., Kennedy Park Homes Assoc. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971) (city rezoned parcel to prevent construction of low income housing project); Dailey v. City of Lawton, Oklahoma, 425 F.2d 1037 (10th Cir. 1970) (city denied building permit and zoning change to low income housing project). On the contrary, the record facts before this Court establish that the zoning ordinance was adopted long before the instant dispute arose and is based upon a comprehensive Master Plan prepared by independent planning consultants (59a).

B. The Governmental Defendants Are Under No Affirmative Duty To Provide Or Promote Low Income Multi-family Housing in Town

Notwithstanding the demand for relief to enjoin any federal grants to the Town until the zoning was changed, appellants argue they are not really challenging the Town's zoning. Instead, they claim to be seeking to enforce a "duty" of the governmental defendants under the Civil Rights Acts and the Constitution to promote low income multi-family housing. According to appellants, this means that no locality

with low density zoning is eligible for a federal sewer or park grant. Significantly, appellants cite no authority for this proposition and conceded below that this was a case of "first impression".

Appellants' argument overlooks the principle that governmental agencies have no constitutional or statutory duty to provide low income housing. Acevedo v. Nassau County, New York ___ F.2d ___ (2d Cir., Dkt. No. 74-1235, decided July 2, 1974). There is no "constitutional guarantee of access to dwellings of a particular quality." Id. at 6 quoting from Lindsay v. Normet, 405 U.S. 56, 74 (1972). Nor does the Fair Housing Act of 1968, 42 U.S.C. §§3601-31 "impose any duty upon a governmental body to construct or to plan for, approve and promote any housing." Acedevo v. Nassau County, supra at 8.

In Acedevo, this Court recently had occasion to consider a complaint by low income plaintiffs against a host of federal, state and local governmental bodies that the abandonment of plans to include low income multi-family housing on Mitchell Field was violative of various federal statutes, regulations, agreements and executive orders. In affirming dismissal of the complaint for failure to state a claim, this Court emphatically rejected the notion that the governmental defendants had an affirmative duty to construct or promote low income multi-family housing.

The Acevedo holding mandates dismissal of the complaint at bar for failure to state a claim, since absent such affirmative duty, no recognizable claim of wrongdoing is alleged against the governmental defendants at bar with respect to the subject grants.

C. The Proposed Sewer and Park Projects
Are Not Discriminatory And The Federal
Grants May Not Therefore Be Enjoined

All parties are agreed that no one in the King-Greeley area will be denied the use and benefit of the sewer system on account of race, creed, religion, income or other discriminatory basis (48a, 49a, 50a, 66a, 68a, 85a). The same is true with respect to the proposed Turner Swamp facilities (53a, 54a, 66a, 68a, 85a). "[T]he proposed recreational facility will be open to all -- resident and non-resident alike -- regardless of race, color, national origin, income, or language" (54a).

Plaintiffs' complaint utterly fails to plead material facts in support of its conclusion of discriminatory conduct. The testimony of Town Supervisor Richard E. Burns unequivocally rebuts plaintiffs' unsupported charge of discrimination recklessly levelled at the Town and at King-Greeley.

Thus, Mr. Burns swears that King-Greeley, the applicant for the sewer grant, has no legal power or authority to enact or modify the Town's zoning ordinance. (45a); King-Greeley is occupied by many persons of lower and lower middle income (46a); and it contains a large number of older residences, including multi-family housing constructed prior to the enactment of the Town's zoning ordinance (46a, 49a). Mr. Burns testified (49a-50a):

"There is no policy or plan to exclude any resident or property from use and benefit of the sewer system on the basis of race, creed, religion, income, or other discriminatory basis. The argument made by plaintiffs that the proposed sewer system will adversely inhibit or somehow affect the future construction of multi-family housing in King-Greeley is absolutely wrong. Aside from the fact that there is very little land in King-Greeley available for such construction, the design of the proposed sewer project as noted above [in par. 18] is adequate to service such future construction.

Supervisor Burns notes that King-Greeley executed the required undertaking to not discriminate with respect to the sewer project, and that it has fully complied with its agreements (50a). Moreover, Mr. Burns directly rebuts plaintiffs' insinuation that King-Greeley discriminates against black and Spanish speaking people of low and moderate income. He states: (49a):

"Housing within King-Greeley covers the range of economic cost, but small, older homes inhabited by working class and lower middle class people are predominant. All of the real estate brokers serving the area have been active in, and have pledged to promote open housing for all groups of people. There has been no effort to discriminate in sales or rental of housing in King-Greeley."

Notwithstanding that plaintiffs' complaint does not directly challenge the legal validity of the Town's zoning ordinance or seek any judicial relief with respect to such zoning and land use practices, Supervisor Burns has forthrightly presented facts underlying the basis of the present zoning ordinance, and the continuing studies underway with respect to the need and desirability of modifying the Town's zoning ordinance to permit the construction of additional units of multi-family housing (58a-61a). No claim is made by appellants that Town enacted its zoning to obstruct or restrict their efforts to obtain housing. Indeed, appellants expressly disclaim by Stipulation having made any effort to lease or purchase housing in Town (85a).

For purposes of the instant action, Town's duly enacted zoning ordinance must be presumed to be valid. The Court's inquiry must be directed to the two projects which are being federally funded. As to these projects, no discrimination is claimed and the record facts establish beyond peradventure that no unlawful discrimination exists or is threatened.

It is clear that federal funding of specific non-discriminatory projects may not be enjoined even where it has been determined that the recipient has been guilty of unlawful discriminatory conduct in connection with other projects or activities. Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972); Board of Public Instruction of Taylor County, Fla. v. Finch, 414 F.2d 1068 (5th Cir. 1969). In other words, the judicial inquiry into the validity of the federal grants is required to be conducted on a program-by-program basis even where the recipient entity had previously been found to have engaged in patently discriminatory conduct, a factor admittedly not present at bar.

In Gautreaux, the Seventh Circuit in a previous decision had held that HUD had violated the due process clause of the Fifth Amendment by its acquiescence in the pre-1969 site selection procedure of the Chicago Housing Authority. It nonetheless reversed an order of the District Court enjoining HUD from making available to the City of Chicago funds for the second period of the Model Cities Program unless the City complied with certain stated conditions. The Seventh Circuit noted the absence of findings by the District Court "that the Chicago Model Cities Program has been administered or that it is tainted with racial discrimination." Id. at 126. The Court wrote:

"Intervenor-appellants well state the question before us to be: 'But here one party (HUD) had been ordered to stop financing a program, Model Cities, which is free from taint, in order to force a non-party (City of Chicago) to comply with an order in a case in which it was not a party, nor charged with anything, nor found to have done anything improper and of course, not ordered to do anything.'" Id. at 127.

* * *

"We think it was improper for the District Court to threaten the termination of a program which was not tainted with discriminatory action in order to bring about a cure of a separate program which was found to have been so tainted.
Id. at 127.

The Court also observed:

"It was and is the desire of the United States Government to provide breakfasts, day-care centers, improved and expanded educational facilities and adequate medical facilities for the needy through the Model Cities Programs. Other Program activities included non-discriminatory public housing encompassed in six of the fifty activities of the Program. We believe Congress did not desire a policy of forsaking all the beneficial aspects of the Model Cities Program not tainted by discrimination for one aspect of the Program which could be, but has not yet been found to be discriminatory." Id. at 128.

In the Taylor County case, the Fifth Circuit reversed an order of the Secretary of Health, Education and

Welfare terminating the payment of federal funds to the plaintiff for violating Title VI of the Civil Rights Act of 1964. The plaintiff's position that payment of funds to non-discriminatory programs could not be terminated to compel compliance with HEW's guidelines for intergration of the schools was upheld. In criticizing the Secretary's failure to make findings on a program-by-program basis, the Court observed:

"Three separate and distinct federal programs are here involved. One concerns federal aid for the education of children of low income families, one involves grants for supplementary educational centers; the third provides special grants for the education of adults who have not received a college education. Each of the programs has a different objective; each requires a separate plan and separate administrative approval; and each has an individual provision for appellate review. Under these circumstances it is not possible to say on the basis of segregation of faculty and students that all programs in the schools in Taylor County are constitutionally defective. It is perfectly possible that the federal grant for supplementary educational centers would have been used for a faculty entirely separate from the rest of the school system. It is also possible that the grant for adult educational classes supported a program that was administered in an entirely desegregated manner even if the elementary and high school classes were not. HEW's failure to make findings of fact on these issues has deprived this Court of the means with which to properly discharge its

reviewing function. In order to affirm HEW's action, we would have to assume, contrary to the express mandate of 42 U.S.C.A. §2000d-1, that defects in one part of a school system automatically infect the whole. Such an assumption in disregard of statutory requirements is inconsistent with both fundamental justice and with our judicial responsibilities." (Footnotes omitted) Id. at 1074.

The foregoing decisions rest on an appreciation of the crucial fact that the real beneficiaries of the federal funds are not the legal entities who nominally are the recipients but the individual citizens who will be adversely affected by the cut-off of such funds, and the need to consider the interest of these individual beneficiaries. On this point, the Gautreaux Court correctly noted:

"In a Civil Rights case, the Court's task is 'to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.' Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16, (1971). But here there was no balancing of interests. The rights of the many thousands of beneficiaries of the Model Cities Program were entirely ignored." Id. at 127.

* * *

"The policy of limiting administrative power to terminate federal funds to activities which only are discriminatory or segregated, was not for the protection of the political entity whose funds

were severed, but for the innocent beneficiaries of the programs and activities not tainted by discriminatory tactics." Id. at 128.

The Fifth Circuit adopted the same rationale. In Taylor County, it wrote:

"It is important to note that the purpose of limiting the termination power to 'activities which are actually discriminatory or segregated' was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by the discriminatory practices." Id. at 1075.

Application of these principles virtually dictates a dismissal of the complaint at bar for the additional reason of appellants' failure to state a claim. Here we are confronted with two local entities who have not been found to have violated the Civil Rights Acts in connection with any other programs or activities. Clearly, the instant projects are free from any taint of discrimination. The need for the projects and their intrinsic importance to the lives and well being of the individual residents of the Town and King-Greeley are clear. In addition, the environmental, educational and recreational benefits to be derived from the Turner Swamp project will accrue not only to residents of the Town but to countless non-residents as well.

Conclusion

For each of the foregoing reasons, the judgment of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RACHEL EVANS, STEVEN R. KIDD,
FERNELL PATTERSON and WALTER
B. BROOKS, JR., on behalf of
themselves and all others
similarly situated,

Plaintiffs-Appellants,

against

JAMES T. LYNN, Secretary,
Department of Housing and
Urban Development, et al.,

Defendants-Appellees
and

TOWN OF NEW CASTLE
Defendant-Intervenor-Appellee.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 12th
day of August, 1974, he served two copies of the
Brief for Appellee Town of New Castle on
Lois D. Thompson, Richard F. Bellman and Christopher Jensen, Esqs
the attorneys for the Appellants

by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorneys at
No. 57 Tuckahoe Road, Yonkers () N. Y.,
that being the address designated by them for that purpose upon
the preceding papers in this action.

Irving Lightman

Sworn to before me this

12th day of August, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976

Due and timely service of Two copies
of the within Brief is hereby
admitted this 27th day of August 1974

... *Wickles, Gattuso, Taylor & Howard*
Attorney for ~~Appellants~~ *Appellants*
Trieste Regional Planning

(2)
RECEIVED
Paul J. Curran
UNITED STATES ATTORNEY
8/12/74 *[Signature]*